

UNITED STATES
v.
ANNA WIRZ

IBLA 84-271

Decided November 20, 1985

Cross appeals from a decision by Administrative Law Judge L. K. Luoma declaring three placer mining claims invalid and declaring one placer mining claim to be valid in part. CA-5869.

Affirmed in part, reversed in part.

1. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Surface Resources Act: Generally

Sec. 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that common varieties of building stone are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man/marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter up to and including the time of a contest hearing.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability

Whether a prudent man would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine on a mining claim is an objective test, and, thus, it does not depend on the circumstances of the individual mining claimant. When in a contest of a patent application, the evidence shows that prior to July 23, 1955, a mining claimant extracted and sold decorative building stone from a group of claims, but that the actual net return was meager, the claimant has failed to show that a person of ordinary prudence would have attempted to develop a valuable mine.

APPEARANCES: LeRoy W. Wirz, Esq., Bakersfield, California, for contestee; Judy V. Davidoff, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for contestant United States.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The United States and Anna Wirz have each appealed from a decision of Administrative Law Judge L. K. Luoma issued December 29, 1983, declaring the Ornamental Rock Mine, Baldwin Rock Mine, and White Rock Mine placer mining claims invalid for lack of discovery of a valuable mineral deposit and declaring a 20-acre portion of the Colored Rock Mine placer claim to be valid and eligible to go to patent if the application is in other respects in proper order. 1/ In 1979 Wirz' husband, Werner Wirz, filed an application for patent to the four claims. 2/ The Bureau of Land Management (BLM), at the request of the Forest Service, issued a contest complaint on September 30, 1982, charging that there was not presently, nor had there been prior to

1/ Both Wirz and the United States have filed motions for summary dismissal. Wirz contends in her motion that the appeal of the United States should be dismissed because its statement of reasons was not timely filed. Wirz argues that because the statement of reasons was required to be filed on or before Feb. 29, 1984, and it was not, the appeal should be dismissed. The Board received the statement of reasons on Mar. 5, 1985. The certificate of service indicates the statement of reasons was transmitted on Feb. 29, 1984, the last day of the 30-day appeal period. Wirz asserts that the statement was not transmitted before the end of the period in which it was required to be filed, citing 43 CFR 4.401(a). Contrary to this assertion, the United States had until midnight of Feb. 29 to "transmit" its statement to be eligible for the 10-day grace period incorporated in 43 CFR 4.401(a). This it did. Wirz' motion to dismiss is denied.

The Government's motion is predicated on an alleged failure by Wirz to comply with 43 CFR 4.412, requiring a statement of reasons, not accompanying the notice of appeal, to be filed with the Board. The Government claims that Wirz improperly filed her statement of reasons with the Hearings Division. The record shows the Wirz notice of appeal was filed on Feb. 2, 1984. Thus, she had until Mar. 5, 1984, to file her statement of reasons (Mar. 3, the 30th day from Feb. 2, 1984, being a Saturday). On Feb. 17, 1984, she filed her statement of reasons with the Hearings Division. She did not file a copy with the Board. The Hearings Division, however, forwarded the statement to the Board, and it was timely received. Further, the Government argues that Wirz violated 43 CFR 4.413 which requires an appealing party to serve a copy of the notice of appeal and any statement of reasons on the Regional Solicitor having jurisdiction over the state in which the appeal arose. Counsel for the Government does not contend that Wirz failed to serve her, and the record shows that she was, in fact, served. This proceeding, although initiated under the authority of the Secretary of the Interior, was prosecuted by counsel employed by the Department of Agriculture, acting on behalf of the Forest Service in accordance with a Memorandum of Understanding between the agencies. Accordingly, it was appropriate that counsel for the Forest Service be served, rather than counsel for BLM. In addition, even if Wirz were required to serve counsel for BLM in this case, counsel for the Forest Service has shown no prejudice by such failure to serve. The Government's motion to dismiss is denied.

2/ Werner Wirz passed away in 1981. Anna Wirz is his successor in interest to these claims.

July 23, 1955, disclosed within the boundaries of the mining claims, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery; that the land involved was nonmineral in character and was not chiefly valuable for building stone; and that three of the claims were excessive in area and were not limited to 20 acres for each individual claimant. A hearing on the complaint was held on March 10-11, 1983, in Ontario, California. Subsequently, Judge Luoma issued his decision which is the subject of the appeals.

At the hearing the principal arguments raised by the Government were that the quartzite found within the limits of each claim was a common variety material not subject to location under the mining law and that the tests for discovery of a valuable mineral deposit were not satisfied for any of the claims prior to July 23, 1955, or at any time thereafter. Judge Luoma agreed with the Government that the material on the claims is a common variety of stone locatable only prior to July 23, 1955. However, he found that Wirz had established by a preponderance of evidence the discovery of a valuable mineral deposit in the claimed area in 1950 that had been maintained to the time of the hearing. Judge Luoma limited the area of the discovery to a 20-acre portion of the Colored Rock Mine claim.

Wirz, in her statement of reasons, appeals those portions of the Administrative Law Judge's decision which reduced the Colored Rock Mine claim from 40 to 20 acres, and which held the Ornamental Rock Mine, the Baldwin Rock Mine, and the White Rock Mine claims to be invalid. The Government, on the other hand, charges that the part of Judge Luoma's decision which holds that a 20-acre portion (yet to be selected) of the Colored Rock Mine claim is valid and may go to patent is erroneous.

[1] The initial issue we will address on appeal is whether or not there was a discovery of a valuable mineral deposit on any of the four claims prior to July 23, 1955, and continuing to the time of the hearing. The law relating to whether or not there is a discovery of a valuable mineral deposit has been set forth many times. Pursuant to the mining laws of the United States, the locator of a mining claim is entitled to purchase land containing a valuable mineral deposit. 30 U.S.C. § 22 (1982). A valuable mineral deposit has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (1982), declared that deposits of common varieties of sand and gravel, building stone, and certain other materials would no longer be deemed valuable mineral deposits under the mining laws. In order for a mining claim for a common variety of mineral, located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man/marketability test of discovery must have been met at the time of the Act and reasonably continuously thereafter up to and including the time of a contest hearing.

Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791, 795 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); United States v. The Dredge Corp., 54 IBLA 281, 284 (1981).

If a claimant locates a group of claims, discovery must be shown to exist on each claim. United States v. Oneida Perlite Corp., 57 IBLA 167, 181, 88 I.D. 772, 780 (1981); United States v. Williamson, 45 IBLA 264, 278, 87 I.D. 34, 42 (1980), and cases cited.

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. Refutation requires dismissal of the contest complaint. United States v. Cannon, 70 IBLA 328 (1983); United States v. Lewis, 58 IBLA 282 (1981). Where a patent application has been filed as in this case, the claimant must also preponderate over those issues raised by the Government's prima facie case. Should the claimant prevail on those issues, dismissal is not the proper course of action, however, if there is a lack of evidence on other essential issues. The required procedure in such a proceeding is to remand the case for a further hearing on such essential issues. United States v. Hooker, 48 IBLA 22, 27 (1980).

Judge Luoma summarized the evidence regarding the location of the claims and the mineral involved as follows:

A. Background of the Claims--Improvements

1. Ornamental Rock Mine

This claim was located and recorded by William C. Arnold and Herbert G. Arnold in 1951 [March 9 and March 12, respectively]. According to Mineral Survey No. 6858 (Ex. 3, attachment III-21h) the claim covers 50.863 acres making it 10.863 acres more than is allowed two locators on one association placer location. 43 CFR § 3842.1-2 (Ex. 3, p. 3). On March 13, 1968, the claim was quitclaimed to Werner F. Wirz (husband of contestee, now deceased) and it was recorded on March 21, 1968. Mr. Wirz developed this claim and placed improvements on it. These improvements consist of a one mile road stretching through the claim and a pit covering approximately 140,400 square feet. The surface of the talus material on the claim has been distributed by bulldozing it to a centralized loading area. The mineral survey indicates this area has 1,079,000 square feet of talus.

2. Colored Rock Mine

This claim was located and recorded by Werner and Marguerita Wirz in 1950 [December 27 and December 29, respectively]. Mineral Survey 6858 (Ex. 3, attachment III-21h) shows this association claim accounting for 47.477 acres, an excess of 7.477 acres (Ex. 3, p. 3). The area of talus exposed on the claim as shown by the survey is approximately 1,075,000 square feet. There are

two pit areas consisting of a series of narrow, shallow benches and slopes (Ex. 3, p. 12). The rock contained within these pit areas is a monocolored group of 10-inch or less size quartzite found in the top two feet of the talus (Ex. 3, p. 12). There is also decorative stone on the claim ranging in color from white to pink to red and occasionally reddish-lavender. Contestee testified that to assist in the workability of this claim, Mr. Wirz built rock slides and boardwalks. The boardwalks were constructed of lumber salvaged from an abandoned high school at no cost to him (Tr. 230). In 1956 or 1957 Mr. Wirz constructed a type of railroad on the claim. It has a small wagon with cables and a pulley. He would hook the cable to a car, drive the car on an adjacent road to pull the wagon up a slope, load the wagon with rocks, then lower the wagon by backing up the car. In this way the rocks would more easily be loaded into a waiting truck (Tr. 231). This railroad was built of salvage material with an estimated cost of \$6,000 (Ex. 3, attachment III-3). Some time later it was removed to be relocated farther uphill but due to Mr. Wirz's health it was never used again (Tr. 230). In addition, the claim area has one and one-half miles of single lane road traversing it that is maintained by contestee at an annual cost of approximately \$100.

3. Baldwin Rock Mine

In 1951, Herbert G. Arnold located [January 5] and recorded [February 27] the claim consisting of 12.156 acres. His interest in the claim was quitclaimed to Werner Wirz, March 13, 1968, and this deed was recorded March 21, 1968. The claim has an exposed talus area of approximately 375,000 square feet and includes a pit area. The decorative rock on the claim has a color ranging from white, red-brown and pink to yellow-brown.

4. White Rock Mine

Werner Wirz located this claim in 1951 [July 3], and recorded it shortly thereafter [August 10] (Ex. 3, p. 2-4). The claim embraces 48.556 acres and therefore, is 28.556 acres in excess of acreage allowed by law for location. The majority of the talus exposed on the claim is white in color and covers approximately 1,548,350 square feet. There are also some quartzite outcroppings standing 10 to 15 feet high (Ex. 3, p. 13). Mr. Wirz placed improvements on the claim consisting of a half-mile of single lane road and one boardwalk approximately 100 feet long.

B. Minerals Involved

The quartzite float rock, for which the claims were located, forms talus slopes along the south and east slopes of Gold Mountain within the San Bernardino Mountains. This quartzite on

the claims is part of the Saragossa Quartzite formation that is widespread in the vicinity, underlying approximately 28,000 acres. It is a dense tough rock that does not lend itself to easy splitting, shaping or crushing. Quartz is derived from sandstone though it possesses a very low degree of porosity and the broken surfaces are relatively smooth in comparison with the rough surfaces of sandstone. The talus slopes on the claims are white to gray in coloration commonly with pink manganese and brown iron staining on the fractures. The most vivid coloration occurs within the top two feet of the quartzite formation and below this depth the rock is uniformly rust-brown or black.

Quartzite is commonly used in the Portland cement industry as a raw material for silica in the manufacture of cement and as a refractory material for brick. Due to its physical qualities quartzite is well suited for use as an aggregate, riprap and ballast for highways and railroads. However, in addition to its suitability for these common rock purposes, quartzite is also valuable as a decorative building stone in fireplaces, walls, facades, and veneering.

1 A slope of talus is a heap of coarse rock waste at the foot of a cliff or a sheet of waste covering a slope below a cliff (Dictionary of Mining, Mineral, & Related Terms, Bureau of Mines, Department of the Interior (1968)).

Decision at 2-4.

As a basis for his conclusion that a discovery had been made on the claims in 1950 and that validity had been maintained to the time of the hearing, Judge Luoma found that from 1950 through 1955 claimants produced 761 cubic yards of decorative building stone which was sold to local stone masons and contractors for use in construction of walls, fireplaces, and facades for a gross profit of approximately \$13,000, or \$2,600 per year. During subsequent years and to the time of the hearing Judge Luoma found the level of production had been continuous and the level of returns reasonably constant with total gross revenue of approximately \$78,000. He further found that sales of building stone contributed substantially to claimants' livelihood and that over the years the expense of conducting the operation was minimal and percent of profit substantial. Decision at 4, 7.

The Judge's findings are attacked on a number of fronts by the Government. First, the Government asserts the finding of average gross annual income of \$2,600 from the claims for the years 1950-55 was in error. Since the Colored Rock Mine claim was not located until the last few days of 1950 and the Baldwin Rock Mine, Ornamental Rock Mine, and White Rock Mine claims were not located until January, March, and July 1951, respectively, the Government argues, the sales figures for 1950 are irrelevant. Likewise, the Government contends, the critical date is July 23, 1955, and sales thereafter in 1955 are not relevant. The Government argues the gross annual income figure should be adjusted accordingly.

We find no need to adjust that figure. It is clear that sales are not absolutely necessary to establish the marketability of material from a claim. Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972). However, it is equally clear that evidence of sales may be used to establish marketability. The evidence of sales in this case from before location of the claims (which sales were made under a Forest Service special use permit) continuing beyond July 23, 1955, is probative evidence of the marketability of the stone. In addition, the adjustment sought by the Government would result in a change of less than \$400 per year from \$2,600 to \$2,238.63. The important aspect of the sales figures, from appellant's standpoint, is the relatively constant yearly gross revenue from the claims from 1947 to 1978.

The Government further challenges the Judge's finding that production has been reasonably constant. The Government points to the years 1974-81 as indicating a significant downward trend in sales, citing Exhibit 3, attachments IV-2, IV-6-7. Wirz explained at the hearing that this was due to a general slump in the construction industry and the ill health of her husband. She also produced a document at the hearing on which she calculated sales for 1982. That document showed \$4,805 in gross sales (Exh. A), although she had no receipts at the hearing to substantiate her figures. We find Judge Luoma's description of production as reasonably constant was not inappropriate.

Most troublesome of the arguments raised by the Government is its assertion the Judge erred by failing to adequately consider the costs properly attributable to production of the material from the claims. We will examine the evidence relating to this issue.

Anna Wirz married Werner Wirz in 1959, following the death of his first wife. Anna Wirz helped her husband work the claims, as had his first wife. Their mining operation was essentially a man and wife operation (Tr. 263). They gathered and loaded the rock and made deliveries with only occasional help from others (Tr. 261-62). This method of operation continued until about 1974 or 1975 when stone masons began coming to the claims and doing "all the labor themselves" (Tr. 260). The Wirz' livelihood was derived from the claims and in winters from selling firewood and plowing snow (Tr. 257). They never kept any records of production or sales from any separate claims. The four claims were worked as a group (Tr. 246-47, 257).

Wirz presented no evidence at the hearing relating to the cost of mining; however, on cross-examination certain costs were disclosed. Roads were built over the years across the claims (Tr. 227), but Wirz had no idea of the cost of construction (Tr. 228), although she estimated yearly road maintenance at \$100 per claim (Tr. 229). Boardwalk and slides were constructed all over the claims (Tr. 227, 229). Wirz did not know the cost of constructing these (Tr. 230). ^{3/} A railroad, ore car, cables, and a pulley were placed on the claims (Tr. 227, 230). Wirz believed these improvements were placed on the

^{3/} A declaration in the patent application stated "the cost of these sections of steel slides was approximately \$2,550.00" (Tr. 233-34, Exh. 3, Attachment III-3).

claims in 1956 or 1957. She had no knowledge of the costs involved (Tr. 231). ^{4/} A dump truck and four-wheel drive Army vehicle were used and maintained for use on the claims and in the wood business (Tr. 235). Wirz was unfamiliar with the costs associated with their use on the claims (Tr. 235).

Wirz was unable to give an estimate of the labor costs involved on an annual basis for producing the rock, including the value of her labor or that of her husband's or any payment to hired labor (Tr. 236). After the method of production changed in 1974 or 1975, certain costs were eliminated, but Wirz admitted that some expenses, such as fuel costs, time for trips to the site, and road maintenance were still involved (Tr. 224-25).

The Government asserts that none of these costs for production (including labor), transportation, improvements, equipment, maintenance, or overhead were subtracted from the gross income figures provided in the patent application or submitted at the hearing nor were they adequately considered by Judge Luoma. ^{5/} At the hearing the Government produced an estimate of the costs attributable to the production during 1951 to 1955 (Exh. 6). That estimate showed the average annual net income for the 5-year period from 1951 through 1955 to be \$362.45 for all four claims (Exh. 6; Tr. 83-88). Wirz presented no evidence to rebut the Government's estimate of costs.

[2] The application of the prudent man/marketability test requires that the cost of extraction, processing, and transportation of the mineral must be considered because such costs bear on the question whether a person of ordinary prudence would be justified in the further expenditure of labor and means in developing a valuable mine. United States v. Coleman, *supra*. Furthermore, the Department has held that where a mining claim is operated as a one-man operation the value of the claimant's labor must be considered in determining whether there has been a discovery of a valuable mineral deposit. United States v. White, 72 I.D. 522, 526 (1965), *aff'd*, White v. Udall, 404 F.2d 334 (9th Cir. 1968).

The only evidence applying cost considerations to gross income figures are those provided by the Government. Those calculations establish that the return from sales of decorative building stone from the claims for the years

^{4/} The patent application also contains a cost figure for the "railway and ore car" of approximately \$6,000.

^{5/} The record indicates that at the hearing both the Judge and Wirz recognized the necessity for deducting labor costs from gross income. The relevant part of the transcript reads:

"JUDGE: Now, take the figures above that point [referring to the gross income figures in Exh. 3, Attachment IV-1a for the years prior to 1974-1975], before that, I take it then you and your husband did provide your own labor then?

"THE WITNESS: Yes, sir.

"JUDGE: So that whatever that was worth would have to be deducted as a cost from that net figure because these figures that are shown as amount, I take it are the amounts of money that you actually received.

"THE WITNESS: Yes, sir."

(Tr. 261).

1951-55 was only about \$100 per claim. ^{6/} Importantly, the sale of decorative building stone from the claims from 1947 through 1981 represented only 12.6 percent of the total sale of material from the claims during that period, and from the time of location of the claims through 1981 only about 11 percent of the total sales (Tr. 64; Exh. 3 at 17). The other sales of material were for uses such as fill, subbase, and riprap. Material whose principal value is for use for those purposes is not a locatable mineral and never has been a locatable mineral. *United States v. Verdugo & Miller, Inc.*, 37 IBLA 277 (1978); *United States v. Bienick*, 14 IBLA 290 (1974). ^{7/} Thus, in order to establish a discovery on the claims in question, Wirz may only rely on the decorative building stone sales, which were a minor source of income from the claims. ^{8/}

The fact that Werner Wirz and Marguerita Wirz, his wife at that time, may have been willing to work the claims for such a return does not satisfy the prudent man rule. That rule is an objective standard and is not dependent on subjective considerations. Therefore, labor costs must be considered in determining whether a particular operation has a reasonable prospect of success, and the value of the labor of an individual mining claimant is not to be treated any different than that of one he might hire. Either must be considered when determining the likelihood of establishing a profitable mine. *United States v. Gardener*, 18 IBLA 175, 179 (1974); *United States v. Harper*, 8 IBLA 357, 365 (1972). The cost of equipment is also a factor which must be considered. In *United States v. Garner*, 30 IBLA 42 (1977), the Board stated at page 67: "Such costs must necessarily include the amortization cost of the equipment used in the mining operations, even though claimant by fortuitous circumstance has access to machinery at a cost less than the average prudent person would have to pay."

The Board concluded in *United States v. Gardener*, *supra* at 179:

Appellant's willingness to ignore labor costs and to expend further time and money for a meager return does not warrant the conclusion that the material on the contested claims is valuable within the meaning of the general mining laws, since no prudent man would invest in actual operations under these circumstances. *United States v. Edwards*, 9 IBLA 197, 203 (1973); *United States v. Harper*, [8 IBLA 357] at 369.

The evidence in this case relating to the period 1951-55 discloses an average gross annual income figure of approximately \$2,200 for sales of

^{6/} As stated, Wirz produced no records relating to individual production or sales from any particular claim. Thus, we assume for purposes of this decision, equal production and sales from each of the claims.

^{7/} There is one aberrant Departmental case which held that trap rock which could be profitably marketed for ballast was a valuable mineral deposit subject to appropriation under the mining law. *Stephen E. Day, Jr.*, 50 L.D. 489 (1924).

^{8/} It appears the willingness to work these claims was principally based on their value for and income derived from material not subject to location under the mining laws.

decorative building stone. When that income figure is adjusted for costs, the income drops to about \$400, or \$100 per claim.

Thus, we find the record falls well short of establishing by a preponderance of the evidence that there was a discovery of a valuable mineral deposit on each claim, or on any one claim. It naturally follows that the validity of none of the claims has been established. Although the evidence indicates that the stone was probably marketed as a decorative building stone at a profit prior to July 23, 1955, by Werner Wirz, the objective standard of what a prudent man would do has not been satisfied. The fact that Werner Wirz was willing to work these claims for a meager return from the sales of decorative building stone does not warrant the conclusion that a person of ordinary prudence would be justified in undertaking the same operation. The Judge erred in finding that Anna Wirz established the existence of a valuable mineral deposit prior to July 23, 1955. 9/

The principal argument raised on appeal by Wirz is that the Government should be estopped to deny the validity of all the claims. Wirz bases her arguments on two letters, one dated November 3, 1950, and the other dated January 31, 1951, from the Forest Service Supervisor to Werner Wirz.

The November 3, 1950, letter discusses a special use permit which had been issued to Werner Wirz. The letter concludes that the permit is invalid and proposes to terminate the permit as of December 31, 1950. The letter suggests that Werner Wirz establish a placer mineral location for the land which had been covered by the permit.

The January 31, 1951, letter merely provided information that the land on which Werner Wirz made a mineral location was open to mining location, subject to forest regulations. The letter further suggested that if he had not already done so, Wirz should properly locate and record the claim and that "[w]e, therefore assume that your mining claim is valid as long as it complies with the Mining Laws." (Emphasis added.)

In order for estoppel to lie against the Government, inter alia, the individual asserting estoppel must have relied to his detriment on misinformation received because of some affirmative misconduct by Government agents acting within the scope of their authority, on which misinformation the party had a reasonable right to, and did rely. Moreover, the individual must not have known the true state of affairs. United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). The suggestion that Werner Wirz

9/ Since this finding is conclusive as to the validity of all the claims, we need not determine whether Wirz proved a discovery at the time of the hearing; however, we note that in United States v. Harper, supra at 365, 369, the Board rejected the argument that a meager return from a mining claim that supplemented a retirement income would be sufficient to establish the profitability of a venture. The Board cited the objective nature of the prudent man rule. Likewise, because of our disposition on the discovery issue, we need not address any other issues raised by these appeals.

locate and record the claim does not constitute affirmative misconduct. In addition, Wirz must be charged with knowledge of the mining law, and he should have known, if he failed to make a discovery, the mining claims would be declared invalid.

Moreover, this Board has held that the failure of a district forest ranger to object to the location or development of a mining claim in a national forest for a period of years or to request a contest of the validity of the claim does not estop the United States from bringing a contest. United States v. Verdugo & Miller, Inc., supra at 282.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm that part of the decision declaring the Ornamental Rock Mine, Baldwin Rock Mine, and White Rock Mine claims invalid. That part of the decision declaring an unidentified 20-acre portion of the Colored Rock Mine claim valid is reversed. All four claims are declared invalid in their entirety.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Franklin D. Arness
Administrative Judge

